

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JUSTIN ODELL LANGFORD,

Case No. 3:19-cv-00594-MMD-WGC

Petitioner,

ORDER

v.

RENEE BAKER, *et al.*,

Respondents.

I. SUMMARY

12 This habeas matter is before the Court on Respondents' Second Motion to Dismiss
13 (ECF No. 71). For the reasons discussed below, Respondents' motion is granted.

II. BACKGROUND¹

15 Following a nine-day jury trial, Langford was found guilty of one count of lewdness
16 with a child under the age of 14. (Exh. 47, ECF No. 38-8.) On May 17, 2016, the state
17 court entered a judgment of conviction sentencing him to life with parole eligibility after a
18 minimum of 10 years in prison. (Exh. 50, ECF No. 38-11.) Langford appealed and the
19 Nevada Supreme Court affirmed the judgment of conviction. (Exh. 66, ECF No. 39-6.) In
20 July 2017, Langford filed *pro se* motions to modify and/or correct sentence and for
21 sentence reduction in July 2017. (Exh. 70, ECF No. 39-10.) The motions were denied.
22 (Exh. 120, ECF No. 43-8.)

23 Langford filed a *pro se* state habeas petition seeking post-conviction relief, which
24 the state district court denied. (Exh. 139, ECF No. 44-5.) Langford appealed and the
25 Nevada Supreme Court affirmed the denial of relief. (Exh. 201, ECF No. 48-1.) **Prior**
26 **to****Before** the post-conviction appeal decision, Langford filed a second *pro se* state petition

1 in November 2018. (Exh. 179, ECF Nos. 46-11, 47-1.) The state court denied the second
 2 state petition as premature and held that the second state petition was procedurally
 3 barred under NRS § 34.725(1) and NRS § 34.810(2) as untimely and successive finding
 4 Langford failed to show good cause and prejudice or actual innocence to overcome the
 5 procedural bars. (Exh. 198, ECF No. 47-20.) The Nevada Court of Appeals affirmed the
 6 state court's judgment, finding that the second state petition was untimely and successive,
 7 and Langford failed to demonstrate actual innocence to overcome the procedural bars.
 8 (Exh. 219, ECF No. 49-6.)

9 On September 25, 2019, Langford initiated this federal proceeding by filing a *pro*
 10 *se* petition alleging six grounds for relief with numerous subclaims. (ECF No. 1.)
 11 Respondents filed their first motion to dismiss. (ECF No. 30.) The Court granted in part
 12 determining that Ground 2(D1) will not be construed as a ground for relief, Grounds 2(K),
 13 (Y), (T), (U), (Y), (Z), and (A1) are unexhausted, the second portion of Ground 2(W)
 14 alleging that trial counsel failed to "request missing witness jury instruction" is
 15 unexhausted, and Grounds 3 and 4 are dismissed with prejudice. (ECF No. 68.) The
 16 Court also deferred a ruling on exhaustion and any procedural default of Grounds 2(B),
 17 (C), (D), (F), (Q), (R), and (B1). (*Id.*)

18 Respondents now move to dismiss the Petition because Grounds 2(B), (C), (D),
 19 (F), (Q), (R), and (B1) are procedurally defaulted.² Langford argues that the state district
 20 court did not have jurisdiction to reach a decision on the merits, that records were not
 21 provided to Langford and his previous counsel, and that the state district court refused to
 22 acknowledge Langford's arguments. (ECF No. 72.)

23 **III. DISCUSSION**

24 Federal courts are barred from considering a state prisoner's habeas claim if the
 25 state courts denied his claim based on an independent and adequate state procedural
 26 rule. See *Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000). Nevada's one-year statute
 27

28 ²Grounds 1, 2(A), 2(E), 2(G), 2(H), 2(I), 2(J), 2(L), 2(M), 2(N), 2(O), 2(P), 2(S),
 2(V), 2(X), 2(C1), 5, and 6 are not addressed by this motion.

1 of limitation³ for post-conviction petitions and prohibition on second or successive post-
 2 conviction petitions are independent and adequate state procedural rules as applied in
 3 non-capital cases. See, e.g., *Williams v. Filson*, 908 F.3d 546, 580 (9th Cir. 2018); *Bargas*
 4 v. *Burns*, 179 F.3d 1207, 1211-14 (9th Cir. 1999). When a petitioner “procedurally
 5 defaults” a federal claim, judicial review is barred unless he can show either: (1) “cause
 6 for the default and actual prejudice as a result of the alleged violation of federal law,” or
 7 (2) “that failure to consider the claims will result in a fundamental miscarriage of justice.”
 8 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); see also *McQuiggin v. Perkins*, 569
 9 U.S. 383, 386 (2013) (the miscarriage of justice exception ensures “that federal
 10 constitutional errors do not result in the incarceration of innocent persons”).

11 To demonstrate cause, the petitioner must show that some external and objective
 12 factor impeded his efforts to comply with the procedural rule. See *Maples v. Thomas*, 565
 13 U.S. 266, 280-81 (2012). Ignorance or inadvertence does not establish cause. *Murray v.*
 14 *Carrier*, 477 U.S. 478, 486-87 (1986). To show prejudice, a petitioner must prove not
 15 merely that the error created a possibility of prejudice, but that the error worked to his
 16 actual and substantial disadvantage, infecting the entire proceeding with constitutional
 17 error. See *Carrier*, 477 U.S. at 494; *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019).
 18 To demonstrate a fundamental miscarriage of justice, a petitioner must show that the
 19 constitutional error complained of probably resulted in the conviction of an actually
 20 innocent person. See *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). This is a
 21 narrow exception and it is reserved for extraordinary cases only. See *Sawyer v. Whitley*,
 22 505 U.S. 333, 340 (1992).

23 In Ground 2(B), Langford alleges counsel allowed the state court to use a coercive
 24 *Allen* charge. (ECF No. 5 at 5.) Ground 2(C) alleges counsel allowed the violation of Rule
 25 24(B) of Federal Rules of Criminal Procedure. (*Id.*) Ground 2(D) alleges counsel failed to
 26 notify the state court that a government agency suppressed evidence. (*Id.*) Ground 2(F)
 27 alleges counsel failed at the discovery process. (*Id.*) Ground 2(Q) alleges counsel did not

28 ³NRS §§ 34.726, 34.810(2).

1 ensure the jury was properly sworn.⁷ (*Id.* at 6.) Ground 2(R) alleges counsel allowed the
2 case to proceed without a grand jury indictment. (*Id.*) Ground 2(B1) alleges cumulative
3 errors by counsel. (*Id.*) Langford raised each of these claims in his second state petition.
4 (Exh. 179, ECF No. 46-11 at 23-28, 32-35, 51-73.)

5 Langford's claims in Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) are procedurally
6 barred. Langford raised Grounds 2(B), (C), (D), (F), (R), and (B1) for the first time in state
7 proceedings in his second state habeas petition. (Exh. 179; ECF No. 46-11.) Although
8 Langford raised Ground 2(Q) in his first habeas appeal, the Nevada Supreme Court
9 declined to consider it in the first instance. (Exh. 201; ECF No. 48-1.) Langford included
10 Ground 2(Q) in his second state habeas petition. The state district court dismissed
11 Langford's second state habeas petition as successive and procedurally barred under
12 NRS § 34.725(1) and NRS § 34.810(2) finding Langford failed to show good cause and
13 prejudice or actual innocence to overcome the procedural bars. (Exh. 196; ECF No. 47-
14 18.)

15 The Nevada Court of Appeals' determination that Grounds 2(B), (C), (D), (F), (Q),
16 (R), and (B1) are procedurally barred under NRS § 34.726(1) and NRS § 34.810(2) was
17 an independent and adequate ground to affirm the denial of the claims in Langford's
18 second state habeas petition. The burden thus falls on Langford to prove good cause for
19 the default and actual prejudice. See NRS §§ 34.726(1), 34.810(3).

20 Langford argues that the state district court did not have jurisdiction to reach a
21 decision on the merits because the Nevada Supreme Court had not issued a remittitur on
22 the appeals. (ECF No. 72.) Langford further argues that records were not provided to
23 Langford and his previous counsel, and that the state district court refused to
24 acknowledge Langford's arguments. (*Id.*) The Court agrees with Respondents that
25 Langford failed to establish good cause and prejudice to excuse his procedurally
26 defaulted claims. (ECF No. 79.) Langford's argument that the state district court did not
27 have jurisdiction to deny Langford's second state habeas petition lacks merit. See *Foster*
28 v. *Dingwall*, 228 P.3d 453, 454-455 (Nev. 2010) (holding that timely notice of appeals

1 divests district court of jurisdiction except as to matters independent from the appealed
2 order and the district court retains jurisdiction to deny requests for relief regarding matters
3 that are not collateral to or independent from the appealed order while the appeal remains
4 pending).

5 Further, Langford's arguments that parties kept records from him and that the state
6 district court did not acknowledge his arguments similarly fail. *Pro se* pleadings are
7 understandably given the benefit of liberal construction. See *Haines v. Kerner*, 404 U.S.
8 519, 520-21 (1972). However, claims based on conclusory allegations are not sufficient
9 basis to provide relief. See *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005). Langford's
10 arguments are not supported by a statement of specific facts that is sufficient to show
11 cause and prejudice to overcome this procedural bar. Accordingly, the Court dismisses
12 Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) as procedurally barred from federal habeas
13 review.

14 **IV. OPTIONS ON A MIXED PETITION**

15 A federal court may not entertain a habeas petition unless the petitioner has
16 exhausted all available and adequate state court remedies for all claims in the petition.
17 See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed petition" containing both
18 exhausted and unexhausted claims is subject to dismissal. See *id.* In the instant case,
19 the Court held that Grounds 2(K), (Y), (T), (U), (Y), (Z) and (A1) are unexhausted and the
20 second portion of Ground 2(W) alleging that trial counsel failed to "request missing
21 witness jury instruction" is unexhausted (ECF No. 68.) Because Langford's petition is
22 mixed, he has three options:

23 1. File a motion to dismiss seeking partial dismissal of only the unexhausted
24 claims;
25 2. File a motion to dismiss the entire petition without prejudice in order to return
26 to state court to exhaust the unexhausted claims; and/or
27
28

1 3. File a motion for other appropriate relief, such as a motion for a stay an
2 abeyance asking this Court to hold his exhausted claims in abeyance while he
3 returns to state court to exhaust the unexhausted claims.

4 **V. CONCLUSION**

5 It is therefore ordered that Respondents' second partial motion to dismiss (ECF
6 No. 71) is granted. Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) are dismissed as
7 procedurally barred.

8 It is further ordered that, within 30 days of the date of this order, Langford must
9 either:

10 1. File a motion to dismiss seeking partial dismissal of only the unexhausted
11 claims;

12 2. File a motion to dismiss the entire petition without prejudice in order to return
13 to state court to exhaust the unexhausted claim; and/or

14 3. File a motion for other appropriate relief, such as a motion for a stay and
15 abeyance asking this Court to hold his exhausted claims in abeyance while
16 he returns to state court to exhaust the unexhausted claims.

17 Failure to timely comply with this order will result in the dismissal of Langford's mixed
18 petition without further notice.

19 DATED THIS 13th Day of December 2021.



20
21 MIRANDA M. DU
22 CHIEF UNITED STATES DISTRICT JUDGE
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